

# Rethinking the U.S. Policy on the International Criminal Court

By BRIAN A. HOYT

**C**hanges to U.S. strategic policy since September 11, 2001, have shifted the focus of American security efforts toward building and maintaining strategic partnerships, as well as increasing the capacity of partner nations to respond to crises and contribute to local, regional, and international stability. These themes run throughout U.S. national security policy documents—including the National Security Strategy, National Defense Strategy, National Military Strategy, National Strategy for Maritime Security, and Quadrennial Defense Review—and the military Services are being reshaped accordingly. Changes in forces include an increased emphasis on language training and cultural awareness, greater engagement/theater security cooperation, and organizational changes to support more training and engagement with partner nations. The President's 2008 budget submission to Congress includes considerable funding in support of diplomatic and military programs fostering improved international partnerships.<sup>1</sup>

Unfortunately, U.S. policy on the International Criminal Court (ICC), including the associated American Service-members' Protection Act (ASPA) of 2002 and Nethercutt Amendment, runs counter to this strategic partnership theme. ASPA and the Nethercutt Amendment have strained U.S. relations with many partners and have caused significant damage at the operational and strategic levels. At the

operational level, ASPA has harmed military-to-military relationships, particularly in the case of international military education and training. At the strategic level, U.S. policy on the ICC separates the United States from the overwhelming majority of the world's modern societies and is further isolating America from its partners and potential partners. The official stance on the court impedes the ability of the Government to carry out the guidance contained in the policy documents listed above, with the strategic consequence of contributing to the decline of U.S. influence and image in the world.

Diminishing American influence has opened the door for other nations to fill the void. Of particular concern in the Western Hemisphere are the increasingly active political and economic roles played by China and Venezuela. The Pew Research Center's Global Attitudes Project, Gallup World Study, and other public opinion polls show that America's image has steadily declined.<sup>2</sup> The United States is increasingly viewed as unilateral, arrogant, self-serving, and hypocritical when its principles and national interests collide. The 2006 Gallup World Study confirmed what many already suspected: U.S. policies, not U.S. values, are to blame.<sup>3</sup> Those who profess to hate America actually hate its policies—good news for the United States, because policies can be changed.

Initial U.S. concerns about the ICC, while well founded, have not materialized in the 5 years the court has been in existence.

Over this period, many cases that have been investigated by the ICC have demonstrated both its effectiveness and impartiality. Given this track record, it is now appropriate to reappraise American policy. Research has shown that the organization is not well understood in the United States, particularly by the military.<sup>4</sup> This article examines Government policies related to the ICC and how they have affected U.S. interests. In an attempt to correct common misperceptions, the article also analyzes the major arguments for and against current policy on the ICC and related legislation.

## The International Criminal Court

The United Nations (UN) Diplomatic Conference of 1998 drafted the Rome Statute of the International Criminal Court. At that time, the United States was a leading proponent of the ICC and heavily involved in drafting the statute. The final vote at the conclusion of the conference was 120 nations in favor, 7 against,<sup>5</sup> with 21 abstaining. The United States voted against the statute, primarily due to concerns about legal protections for American Service-members deployed overseas in a peacekeeping role. The statute went into force in July 2002, 60 days after the 60<sup>th</sup> nation ratified the treaty. There are currently 105 state parties to the ICC. The United States, under the direction of President Bill Clinton, signed the treaty on December 31, 2000, but did not submit it to the Senate for ratification. In 2002, the Bush

Below, left to right: President Bush addresses joint session of Congress; report presented to members of the Assembly of States Parties who have agreed to participate in the ICC; the bench at the Nuremberg War Crimes trials, 1945–1946; Hermann Goering at Nuremberg War Crimes trials



White House (Eric Draper)



International Criminal Court



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administration formally renounced any U.S. obligations arising from the 2000 signature (some have called this “unsigned” the treaty).<sup>6</sup> The treaty has yet to be ratified by the Senate.

The ICC is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity, and war crimes. Aggression is also mentioned in the statute but is not currently defined, and the court claims no jurisdiction over this crime. This topic is due to be discussed at the ICC’s 2009 Review Conference, and it could be adopted into the Rome Statute at that time.

The ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine (for example, if formal proceedings were undertaken solely to shield a person from criminal responsibility). This notion, called *complementarity*, means the ICC complements, rather than competes with, national judicial systems.<sup>7</sup> In addition, the court has jurisdiction over war crimes only when they are committed as part of a plan or policy or as a part of a large-scale commission of such crimes. Thus, individual or isolated incidents of war crimes do not fall under the jurisdiction of the ICC. The nation of the individual involved is responsible for investigating those cases.

### **ASPA and the Nethercutt Amendment**

Though the United States is not a party to the ICC, Congress felt that the court still posed a risk to American citizens (military and civilian) serving overseas. In particular, if a member of the U.S. military were involved in a peacekeeping operation in a country that was a party to the ICC, that nation could conceivably detain and turn him over to the court if he was accused of violating a provision of the Rome Statute. Additionally, senior civilian officials of the U.S. Government could be charged with crimes. Because of this, the United States subsequently passed the American Service-members’ Protection Act, which is designed to induce ICC member nations to sign Bilateral Immunity Agreements (BIAs) with the United States. A BIA is an agreement in which the member nation agrees that it will not arrest, detain, prosecute, or imprison any U.S. citizen (civilian or military) on behalf of the ICC without Washington’s consent. This correlates to Article 98 of the Rome Statute, which acknowledges that a nation may have other international treaty obligations that over-

ride its obligations to the ICC.<sup>8</sup> Thus, BIAs are also known as Article 98 agreements.

ASPA prohibits U.S. military assistance to countries that are parties to the ICC but have not signed a BIA with the United States. For the purpose of ASPA, military assistance includes foreign military financing (including transfer of excess defense articles) and international military education and training. Foreign military financing provides grants to foreign nations to purchase U.S. defense equipment, services, and training. International military education and training provides education and training to students from allied and friendly nations. The fiscal year 2007 Defense Authorization Act removed the ASPA restrictions on international military education and training.

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### *U.S. concerns about the International Criminal Court have not materialized in the 5 years the court has been in existence*

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ASPA also prohibits any agency or entity of a U.S. Federal, state, or local government (including any court) from cooperating with the ICC. This includes providing support to the ICC, extraditing or transferring any U.S. citizen or resident alien to the court, or providing it legal assistance. Finally, ASPA prohibits any agent of the court from conducting investigative activity in the United States or on territory where the Nation has jurisdiction.<sup>9</sup>

A related law, known as the Nethercutt Amendment, also placed economic restrictions on states that have not signed BIAs.<sup>10</sup> Those states are restricted from receiving Economic Support Funds, which are designed to promote economic and political stability in regions where the United States has special security interests.

Exceptions to ASPA and the Nethercutt Amendment exist for major U.S. allies, including North Atlantic Treaty Organization (NATO) member nations, major non-NATO allies,<sup>11</sup> and Taiwan. States receiving assistance under the provisions of the Millennium Challenge Act<sup>12</sup> are not subject to the restrictions of the Nethercutt Amendment. ASPA also contains provisions for a Presidential waiver of its restrictions if the President certifies that it is in the national interest. Waivers have been approved for both ASPA and Nethercutt restrictions.

### **U.S. Policy**

The official U.S. position on the ICC has not changed since the court’s inception in 2002. The Department of State views the court as an unaccountable international body that could target American citizens overseas based on its political motives. Washington’s objections fall into four general categories, discussed below. Much of the angst about the ICC is based on an incomplete or inaccurate understanding of the Rome Statute, so the discussion also attempts to correct some common misperceptions surrounding the court.

First, the United States asserts that according to the Vienna Convention on the Law of Treaties, the Rome Statute is not binding on the United States and the ICC has no jurisdiction over states that are not party to the treaty.<sup>13</sup> The court claims jurisdiction over all persons whether or not their parent nation is a signatory. Second (and the fundamental concern of most U.S. military members) is that the court could claim jurisdiction over charges of war crimes by U.S. Servicemembers resulting from legitimate use of force or by senior civilian leaders resulting from foreign policy initiatives that are not viewed as legitimate by the ICC.<sup>14</sup> Of concern to senior military and civilian policymakers, the threat of prosecution could influence military and foreign policy decisions, thus infringing on U.S. sovereignty. Third, Washington’s position also cites a lack of legal procedural protections (such as right to a trial by jury) that are rights of U.S. citizens under the Constitution. Fourth, the United States raises concerns about accountability of the court—a lack of checks and balances—to prevent political manipulation by member nations or the court itself.

*Objection 1: Jurisdiction of the Court.* The Rome Statute states that the court has jurisdiction “on the territory of any State Party and, by special arrangement, on the territory of any other State.”<sup>15</sup> This means that U.S. forces serving in a country that is party to the Rome Statute are subject to ICC jurisdiction.<sup>16</sup> Although the United States, as a nonparty to the treaty, is not bound by the Rome Statute, the ICC claims jurisdiction over all states under certain circumstances. Washington objects to this claim. Furthermore, in 2002 the United States “unsigned” the treaty with a letter to the United Nations that expressed its intent not to become a party.

However, this objection is only a distraction from the fundamental objections outlined below and is really not central to the question of whether the United States should ratify the

ICC. This is only an issue when the Nation is not a signatory to the Rome Statute.<sup>17</sup> If America ratifies the Rome Statute, it obviously subjects U.S. nationals to the jurisdiction of the International Criminal Court.

*Objection 2: Infringement on U.S. Sovereignty.* It is accepted in the United States that actual war crimes will be punished by the American judicial system, whether by civilian or military courts. In the case of the ICC, the U.S. concern rests on who gets to decide whether charges of war crimes are legitimate, leading to potentially different interpretations of what constitutes a war crime. Differences between U.S. law and that of the International Criminal Court could cause the ICC prosecutor to view a case that was investigated or prosecuted in the United States as inadequate and could prompt prosecution by the ICC. There are indeed differences between U.S. law (including the Uniform Code of Military Justice) and the Rome Statute. These gaps could place a U.S. national in a gray area according to U.S. domestic law, but in direct violation of the Rome Statute. Thus, the concept of complementarity could be abrogated if the ICC determined that the U.S. judicial system was unable to sufficiently investigate or prosecute a crime as defined in the Rome Statute.

These gaps should be closed so that American citizens will be fully covered by the U.S. judicial system. The Rome Statute acknowledged that this situation might exist and included a provision that allows a nation to opt out of the ICC's jurisdiction over war crimes for 7 years after it ratifies the Rome Statute, allowing a period to amend domestic code to close the legal gaps between the Rome Statute and domestic laws.<sup>18</sup> While this is fundamentally an argument for strengthening the provision of complementarity, there are a few gaps that might not be easily closed.

One such case is exemplified by allegations of torture and abuse in the Abu Ghraib, Guantanamo Bay, and overseas Central Intelligence Agency (CIA) detention facilities. It is important to distinguish among these cases. In Abu Ghraib, the United States maintains that incidents of torture and abuse, though not isolated to one occurrence, were not part of a U.S. plan or policy. They would therefore not fall under the Rome Statute's definition of war crimes. In any case, the United States did investigate and prosecute the individuals involved, which would preclude the ICC prosecutor from initiating an investigation.

The Guantanamo Bay and overseas CIA detention facilities cases are more complicated. In both instances, the alleged crimes center around "enforced disappearance of persons," a crime against humanity according to the Rome Statute, and torture (waterboarding, sleep deprivation, and other controversial interrogation techniques), also a war crime. Because these alleged crimes were originally carried out as part of a U.S. plan or policy,<sup>19</sup> they could form the basis for an ICC case if a state party to the ICC, UN Security Council, or ICC prosecutor chose to refer the case to the court.

In the case of Guantanamo Bay, Cuba is not a member state, and the alleged crimes involve U.S. personnel, so U.S. nationals could only be subjected to ICC jurisdiction if the Security Council passed a resolution referring the case to the court, or if the United States or Cuba agreed to accept the court's jurisdiction. The first two scenarios are highly unlikely, but if the ICC prosecutor chose to refer a case to the court and Cuba chose to accept ICC jurisdiction, the case could be prosecuted under the Rome Statute. In the case of the overseas CIA detention facilities, it is possible that U.S. personnel could be subject to jurisdiction, but two conditions would be required: the CIA detention facilities were located in an ICC member state, and the member state did not sign a BIA with the United States. The location of these detention facilities has not been officially disclosed by the United States, so whether these conditions have been met is currently unclear. However, if both conditions

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*in Abu Ghraib, the United States maintains that torture and abuse were not part of a U.S. plan or policy*

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were met, the member state or the ICC prosecutor could refer a case to the International Criminal Court. If these conditions were not met, it is again possible—but unlikely—that a case could be investigated by the ICC if the UN Security Council passed a resolution or the United States or country in which the facility was located accepted ICC jurisdiction.

A second category of common concern is exemplified by supplementary U.S. rules of engagement (ROE) that have come to be called the *Mogadishu rules*, designed for the type of irregular warfare encountered in Somalia 1993. In this scenario, the combatants did not adhere to internationally recognized

standards of warfare such as openly carrying their weapons, wearing distinctive clothing that identified them as combatants, and not shielding themselves behind civilians. The supplementary ROE issued for these situations, which are approved by the Secretary of Defense, have occasionally been mischaracterized as not meeting the standards prescribed in the Law of Armed Conflict. In accordance with Department of Defense policy, however, all supplemental ROE are examined by Judge Advocates General with specific knowledge of operational law and approved by the chain of command up to and including the Secretary of Defense. It is implausible that supplementary ROE would be approved that put U.S. forces outside the protection of recognized international law.

Another concern is the ICC's currently undefined *crime of aggression*. Among U.S. military members, one of the commonly cited reasons for opposition to the ICC is the hypothetical case in which U.S. Servicemembers are part of a unilateral American action that does not have broad worldwide support. If the ICC adopts the crime of aggression article during the 2009 Review Conference, the court could interpret this hypothetical case as a crime of aggression, subjecting U.S. troops, military leadership, or civilian leadership to ICC prosecution. While this is a legitimate concern for the future, the United States as a party to the Rome Statute would be in a much stronger position to shape the definition of aggression. ICC working groups are currently meeting to



Released Abu Ghraib prison detainees board buses to transport them home

define aggression, but the United States is not officially represented and will not have a vote when and if the Rome Statute is amended.

*Objection 3: Procedural Protections.* The Department of State objects to the investigation or prosecution of American citizens by the ICC, stating that U.S. nationals should be dealt with by the American system of laws and due process. Accordingly, U.S. policy is “to encourage states to pursue credible justice within their own institutions, consistent with their responsibilities as sovereign states.”<sup>20</sup> This statement is not at odds with the basic goal of the ICC; indeed, it is a fundamental precept of the court and the foundation of the concept of complementarity that nations have jurisdiction over their own citizens. The ICC was created, however, to address the situation where the sovereign state is unable or unwilling to administer justice when a serious crime has been committed. This is not the case in American society. The United States has consistently shown the commitment to investigate and prosecute Americans who have committed war crimes, as evidenced by the prosecutions of Servicemembers in the Haditha, Fallujah, Ramadi, and Mahmoudiya rape and murder cases,<sup>21</sup> as well as the Abu Ghraib prisoner abuse cases. Furthermore, the ICC has jurisdiction over war crimes only “when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>22</sup>

In the case of crimes that are not associated with armed conflict, such as an assault

or rape committed by a U.S. Servicemember or diplomat in a peacetime overseas environment, existing Status of Forces or Status of Mission agreements continue to prevail.<sup>23</sup> In the case of a crime committed by a U.S. civilian overseas, existing procedures prevail, namely the laws of the nation in which the crime was committed. These procedures are internationally recognized and accepted by the United States.

*Objection 4: Political Manipulation.* Those who favor current policy on the ICC and ASPA state that the Rome Statute could leave American nationals open to prosecution by a court system that does not share all of the same protections as the U.S. judicial system. According to the State Department, the ICC lacks necessary safeguards to ensure against politi-

ted in Iraq.<sup>28</sup> This is an interesting case because Iraq and the United States are not parties to the ICC, but other coalition nations (including the United Kingdom) are. Under the Rome Statute, this excludes the United States from ICC jurisdiction but includes the United Kingdom, which fully cooperated with the court, providing substantial documentation of the alleged crimes. The Prosecutor’s Office reviewed each of the communications and produced a crime analysis from all available information. The majority of alleged crimes were war crimes (as opposed to genocide or crimes against humanity). Many allegations related to the crime of aggression—the legality of the conflict.

The court reiterated that it has no jurisdiction over aggression and found that there was no evidence of genocide, crimes against humanity,

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*according to the State Department, the International Criminal Court lacks necessary safeguards to ensure against politically motivated investigations and prosecutions*

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cally motivated investigations and prosecutions. The Department maintains that ICC authority under the Rome Statute is too broad and that even if the United States were to appropriately exercise its responsibilities to investigate or prosecute in a particular case, the ICC prosecutor could still decide to initiate an investigation or prosecution with concurrence of two judges from a three-judge panel, and the United States would have no recourse to appeal to a higher body.<sup>24</sup> There does exist a system of checks and balances within the court, including an appeals process. That process, however, does not include an appeal to a body above the ICC, such as the United Nations.<sup>25,26</sup> The Rome Statute also requires that biased judges be excused and places restrictions on the prosecutor’s ability to initiate investigations. According to some legal experts, “since the ICC Prosecutor arguably has less authority than a United States district attorney or county prosecutor, the claim that the ICC will pursue politically motivated prosecution appears quite weak.”<sup>27</sup>

Early predictions that the court prosecutor would investigate or prosecute politically motivated cases have not materialized. In fact, the opposite has happened: the court has resisted political pressure to prosecute certain alleged crimes. In an illuminating 2006 letter from the ICC prosecutor, the International Criminal Court acknowledged that it had received over 240 communications from citizens and organizations alleging crimes commit-

or war crimes that fell under its jurisdiction. According to the court, there were isolated criminal acts but no plan or policy to commit those acts by the nations involved. Additionally, the court reviewed the use of cluster munitions. While antipersonnel mines are prohibited by the Ottawa Treaty (to which the United Kingdom is a signatory and the United States is not), they are not specifically prohibited by the Rome Statute; thus, their use did not violate any specific restrictions. Going one step further, the ICC also looked at the use of cluster munitions from the broader perspective of a war crime (“targeting civilians” or “clearly excessive attacks”). The court found that in all cases, cluster munitions were used in a manner consistent with the international law of armed conflict, so there was no reasonable basis to conclude that their use could constitute a war crime.

In the instances of isolated criminal acts, the court noted that national criminal proceedings had been undertaken by the countries involved. The court reiterated that in any case, it did not have jurisdiction for war crimes unless they were committed as part of a plan or policy or as part of a large-scale commission of war crimes. No evidence of such a plan or policy was found.

The ICC passed a crucial U.S. test in Iraq: that it works as designed, free of politically motivated investigations or prosecutions. In doing so, it established legal precedent that will guide future cases.



4th Combat Camera Squadron (Roy Santana)

### Additional Considerations

From a strategic view, U.S. policy on the ICC has a negative impact on how most other nations view the United States. Washington is among the world champions for human rights and rule of law and is vocal in pointing out what it considers to be other governments' violations. Yet the U.S. stance that Americans should be exempt from the jurisdiction of an international court that may not always find in their favor leads others to believe that the values and principles that Americans frequently proclaim others should adopt do not appear to match U.S. policies. This contributes to the world view of U.S. policy as arrogant and hypocritical.

Beyond the points outlined earlier, there are additional considerations regarding Washington's policy on the ICC that many U.S. nongovernmental organizations espouse. The first is ideological. American values are closely aligned with those advocated by the ICC, namely accountability, equality, and justice. If the ICC is even partially successful in its goal of deterring crimes against humanity, genocide, and war crimes, it could ultimately serve to reduce human suffering. Second, and on a more practical level, an effective and impartial ICC is in the best interests of the United States. If the court deters these crimes, it may reduce requirements for worldwide crisis intervention (primarily humanitarian assistance and peace-keeping operations). This could translate to reduced requirements for the U.S. military.

The Department of State has obtained over 100 BIAs, but it appears that the point of diminishing returns has been reached. Those nations that have not yet signed a BIA are unlikely to. The paradox is that many of the remaining nations are those with which the United States needs to improve relations, and ASPA sanctions are making these strained relationships even worse. Particularly enlightening are recent comments from Latin American leaders who, as Adam Isacson said in Senate testimony, are "wearing their refusal to sign Article 98 agreements as a badge of honor."<sup>29</sup> The U.S. policy of ASPA sanctions has not worked with many Latin American nations.<sup>30</sup> Instead of bringing these countries into the fold, sanctions have amplified tensions in a region already hostile to Washington, contributed to the perception of the United States as a bully, and helped U.S. competitors (particularly China and Venezuela) make inroads.

### Negative Impacts

Ratifying the Rome Statute and repealing the associated ASPA and Nethercutt legislation would not be without political and financial costs. Domestically, there is not a wide awareness of these issues. Where there is awareness, it appears to be superficial and often subject to xenophobic influences.

Changing these policies without also changing American perceptions of the ICC could be politically damaging to U.S. policymakers and legislators. The appearance of "softening" is not appealing to Congress, especially while U.S. troops are engaged in Iraq and Afghanistan. While the Bush administration, State Department, and Defense Department continue to oppose changes to current policy, shooting silver bullets in a perceived steep uphill battle is another congressional concern.

Internationally, there may be some impact on relationships with those nations that have already signed BIAs. Many of these nations' leaders expended valuable political capital getting their national legislatures to ratify the agreements, and the United States should acknowledge this by extending some benefit to these countries if sanctions are lifted for all nations without BIAs.

There will be relatively minor impact on the U.S. budget if these programs are restored. The annual cost of affected programs would need to be considered. Finally, there will be some danger to U.S. citizens. The "gaps" in U.S. law, including the Uniform Code of Military Justice, need to be closed to maximize the application of the concept of complementarity. The Rome Statute acknowledges that requirement and allows 7 years for a new party to make those changes. If those alterations are not completed within this time, U.S. citizens may be at risk.

The Armed Forces are planning and executing the strategic guidance as directed in national policy documents. The policy guidance from these documents that emphasizes building and maintaining relationships with partner nations is carried forward in State, Defense, and Service policy documents and is shaping the way the Services organize, train, and equip forces. However, national policy on the International Criminal Court, including the American Service-members' Protection Act of 2002 and its Article 98 requirements, is impeding execution of this guidance. It has also had numerous unintended negative effects. Until this policy is aligned with national strategic guidance,

ASPA restrictions will hamper efforts to build and maintain relationships with emerging and existing partner nations.

Much of the opposition to the International Criminal Court is based on limited or incorrect understanding of the authority, operation, and limits of the court. The debate on the court needs to be reopened, and the debaters need to have the facts. They also need to approach the debate from a strategic perspective that acknowledges that compromise on tactical issues is often required to attain strategic victory.

Retired Ambassador to Saudi Arabia Chas Freeman recently addressed the new Members of Congress about national security policy. His remarks echo those of a host of former and current diplomats but could have been made by anyone who has ever been part of a successful team: "To lead as a team, you must know how to be a team player. To inspire people or nations to follow you, you must have a reputation for moral uprightness, wisdom, and veracity. To hold other people or nations to rules, you must show that you are prepared to follow them too. We all know these things. Why don't we act accordingly?"<sup>31</sup> While Ambassador Freeman was talking about U.S. policy coordination in general, his remarks are applicable to the specific issue of policy toward the International Criminal Court. It is time to reexamine U.S. policy on the court, and it should be done through a strategic lens. **JFQ**

### NOTES

<sup>1</sup> The President's 2008 budget submission to Congress includes approximately \$1.5 billion in the State and International Programs budget for "promoting democratic transitions" and \$1.5 billion for "broad outreach to developing and oppressed countries around the world through international broadcasting, exchanges, and public diplomacy."

<sup>2</sup> See The Pew Global Attitudes Project at <www.pewglobal.org>.

<sup>3</sup> John L. Esposito, "It's the Policy, Stupid: Political Islam and U.S. Foreign Policy," *Harvard International Review*, November 2, 2006, available at <http://hir.harvard.edu/articles/1453/>.

<sup>4</sup> For an excellent study of the International Criminal Court and U.S. military, see Victoria K. Holt and Elisabeth W. Dallas, *On Trial: The U.S. Military and the International Criminal Court* (Washington, DC: The Henry L. Stimson Center, March 2006), available at <www.stimson.org/fopo/pdf/US\_Military\_and\_the\_ICC\_FINAL\_website.pdf>.

<sup>5</sup> Algeria, China, Israel, Libya, Qatar, the United States, and Yemen.

<sup>6</sup> In a May 6, 2002, letter to UN Secretary-General Kofi Annan, Under Secretary of State for

Arms Control and International Security John R. Bolton wrote that “the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.” This removed any obligations the United States had as a *signatory* of the treaty (versus a party that had *ratified* the treaty) in accordance with Articles 12 and 18 of the Vienna Convention on the Law of Treaties.

<sup>7</sup> Rome Statute of the International Criminal Court, Article 1, available at <[www.un.org/law/icc/statute/english/rome\\_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf)>.

<sup>8</sup> *Ibid.*, Article 98.

<sup>9</sup> American Service-Members’ Protection Act of 2002, Public Law 107–206.

<sup>10</sup> The Nethercutt Amendment does place limitations on Economic Support Fund (ESF) assistance for certain foreign governments that are parties to the ICC, *but goes on to say* that ESF will not be made available to a country if they are a party to the ICC *and have not entered into an agreement with the United States pursuant to Article 98* of the Rome Statute. See Public Law 109–102, Title 5, Section 547, para. a.

<sup>11</sup> Designated U.S. major non-NATO allies are Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, South Korea, and Thailand.

<sup>12</sup> The Millennium Challenge Account is a U.S.-funded development fund.

<sup>13</sup> Article 34 of the 1969 Vienna Convention on the Law of Treaties states that a treaty does not create either obligations or rights for a third state without its consent. However, Article 38 states that rules in a treaty become binding on third states through international custom. The rules of the Rome Statute could become international customary law through common use over time. The Vienna Convention on the Law of Treaties entered into force in 1980.

<sup>14</sup> Holt and Dallas.

<sup>15</sup> Rome Statute of the International Criminal Court, Article 4.

<sup>16</sup> *Ibid.*, Article 12.

<sup>17</sup> The United States, like most nations, accepts the principle of customary international law (as distinct from treaty law). Washington accepts the binding nature of customary international law in this case. A particular category of customary international law, *jus cogens*, refers to a principle of international law so fundamental that no state may opt out by way of treaty or otherwise. Examples of this are genocide and crimes against humanity. See a short description of customary international law at <[www.ll.georgetown.edu/intl/imc/imcothersourcesguide.html](http://www.ll.georgetown.edu/intl/imc/imcothersourcesguide.html)>.

<sup>18</sup> Rome Statute of the International Criminal Court, Article 124.

<sup>19</sup> The United States classified the detainees in these facilities as “unlawful combatants” as opposed to prisoners of war (POWs), affording them different rights than POWs (POW status provides internationally recognized protections under the Geneva

Conventions). The U.S. Supreme Court recently determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with al Qaeda, prompting changes to the U.S. policies under discussion. Common Article 3 of the Geneva Conventions of 1949 requires the humane treatment of any personnel detained, whether they are ultimately determined to be prisoners of war, unlawful enemy combatants, retained persons, or civilian internees.

<sup>20</sup> U.S. Department of State, “Fact Sheet: Frequently Asked Questions about the U.S. Government’s Policy Regarding the International Criminal Court (ICC),” July 30, 2003, available at <[www.state.gov/t/pm/rls/fs/23428.htm](http://www.state.gov/t/pm/rls/fs/23428.htm)>.

<sup>21</sup> Ryan Lenz, “GIs May Have Planned Iraq Rape, Slayings,” *The Washington Post*, July 1, 2006.

<sup>22</sup> Rome Statute of the International Criminal Court, Article 8.

<sup>23</sup> These scenarios apply to crimes not associated with armed conflict (and therefore generally outside the stated jurisdiction of the ICC, which considers war crimes, genocides, and crimes against humanity).

<sup>24</sup> U.S. Department of State.

<sup>25</sup> Though the UN Security Council can refer cases to the ICC, the UN has no direct authority over the ICC. The UN consciously separated itself from the ICC to avoid perceptions of political influence on the court. John Bolton, in his July 1998 testimony to the Senate Foreign Relations Committee, objected to this separation, stating that the UN was being marginalized. The UN Security Council, per Article 24 of its charter, is charged with “primary responsibility for the maintenance of international peace and security.”

<sup>26</sup> The UN Security Council does have the ability to delay investigation or prosecution of a case for a year by passage of a resolution. There are no restrictions on how many times such a resolution may be passed.

<sup>27</sup> Lilian V. Faulhaber, “American Servicemembers’ Protection Act of 2002,” *Harvard Journal on Legislation* 40, no. 2 (Summer 2003).

<sup>28</sup> For the text of this letter, see <[www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)>.

<sup>29</sup> See testimony of Adam Isacson, Director of Programs, Center for International Policy, before the Western Hemisphere, Peace Corps, and Narcotics Affairs Subcommittee, Committee on Foreign Relations, U.S. Senate, “The Impact on Latin America of the Servicemembers’ Protection Act,” March 8, 2006, available at <[www.senate.gov/~foreign/testimony/2006/IsacsonTestimony060308.pdf](http://www.senate.gov/~foreign/testimony/2006/IsacsonTestimony060308.pdf)>.

<sup>30</sup> Latin American signatories include Antigua and Barbuda, Belize, Colombia, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Honduras, Nicaragua, Panama, and Saint Kitts and Nevis.

<sup>31</sup> Chas W. Freeman, Jr., “National Security in the Age of Terrorism,” remarks to new Members of Congress in Williamsburg, Virginia, January 6, 2007, available at <[www.saudi-us-relations.org/articles/2007/10/070111p-freeman-security.html](http://www.saudi-us-relations.org/articles/2007/10/070111p-freeman-security.html)>.

# Topical Symposium

## Building Partner Capacity at Home and Abroad

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